

CEIVE

HARDY AND CAREY
ATTORNEYS AT LAW
111 VETERANS BOULEVARD
METAIRIE, LOUISIANA 70005

ASHTON K. HARDY
BRADFORD D. CAREY
MARJORIE R. ESMAN

TELEPHONE: 504-830-4646
TELEFAX: 504-830-4650
OUR FILE NO.

April 3, 1995

DOCKET FILE COPY ORIGINAL

Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5202, STP 1700 A1
5202 M Street, N.W.
Washington, DC 20554

Re: TEC Waiver Request
March 29, 1995 Public Notice
Mimeo No. DA 95-651
PP Docket No. 93-253

COMMENTS

To Whom It May Concern:

On behalf of Radiofone, Inc. (Radiofone), we hereby submit the following Comments on the proposal of Telephone Electronics Corporation (TEC) for a waiver of the eligibility rules for the entrepreneur's block personal communications service (PCS) auction. Radiofone and several other parties have pending appeals before the United States Court of Appeals for the Sixth Circuit, challenging the cellular-PCS cross-ownership restrictions.¹ These restrictions

¹ Radiofone has filed a petition for review of the FCC's Third Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), GEN Docket No. 90-314, RM-7140, RM-7175, RM-7618, released Oct. 19, 1994, erratum, No. 50507, released Nov. 4, 1994. Radiofone's petition for review, Radiofone, Inc. v. FCC, No. 95-3238 (6th Cir. docketed Mar. 7, 1995) (transferred from the D.C. Circuit), has been consolidated with Cincinnati Bell v. FCC, No. 94-3701 (6th Cir. filed July 1, 1994). Radiofone, Inc. also is an intervenor in Bell Atlantic Personal Communications, Inc. v. FCC, No. 94-4112 (6th Cir.), and BellSouth Corporation v. FCC, No. 94-4113 (6th

No. of Copies rec'd
List ABCDE

0710

RECEIVED
APR 17 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

-2-

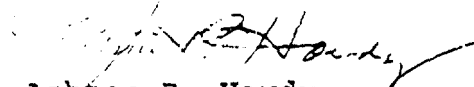
will act to preclude Radiofone and others from the C Block entrepreneur's auction in the same fashion as the financial restrictions will exclude TEC. It would be patently unfair to grant a waiver to TEC, thereby allowing its participation, without resolving the challenges to the cellular-PCS ownership restriction at the same time.

It is arbitrary and capricious, and a violation of the concept of equal protection, to treat similarly situated entities differently. See City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439 (1985). It is well established that the concept of equal protection, embodied in the Fourteenth Amendment, is applicable to the United States Government and its agencies through the due process clause of the Fifth Amendment. See Johnson v. Robison, 415 U.S. 361, 364 N.4 (1974); Richardson v. Belcher, 404 U.S. 78, 81 (1971). The Administrative Procedure Act and Court precedent requires that the Commission treat similarly situated entities in the same fashion, and explain ANY differential treatment. See Columbia Broadcasting System, Inc. v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971). This principle of fair treatment has been applied in the context of waiver requests as well. See Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985). Radiofone believes that its challenge to the cellular-PCS cross ownership restriction is as valid as TEC's challenge to the financial eligibility rules. While framed as a waiver request, TEC's request is clearly in the nature of a settlement of its court challenge. Therefore, the Commission should not arbitrarily facilitate one party's participation in the auction without addressing the substantial issues which bar other parties from the same auction.

Cir.), both of which seek review of the FCC's Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services), 9 FCC Rcd. 4957 (1994). These two cases also have been consolidated with Cincinnati Bell v. FCC.

Please direct any questions concerning the above Comments to the undersigned. Due to the extraordinarily brief comment period allowed by the Commission's March 29, 1995 Public Notice, the subject Comments are being submitted with a facsimile signature. The original will be submitted as early as possible.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Ashton R. Hardy", with a stylized flourish at the end.

Ashton R. Hardy
Attorney For
Radiofone, Inc.

SERVICE LIST

James U. Troup, Esq.
Roger P. Furey, Esq.
Arter & Hadden
1801 K Street, NW
Suite 400K
Washington, DC 20006